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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 594

BEN PEARSON, CARL B. HAUN AND J. T. HAUN,
doing business as BEN PEARSON COMPANY
Petitioners and Appellants Below

v.

L. METCALF WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR ..... *Respondent and Appellee Below*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

J. W. DICKEY
HENDRIX ROWELL
A. F. HOUSE
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PARAGON PRINTING CO., LITTLE ROCK

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PETITION

TO THE HONORABLE HARLAN F. STONE,
Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I

Summary Statement of the Matter Involved

Petitioners produce goods for interstate commerce, and are within the Fair Labor Standards Act of 1938, Title 29, U.S.C.A., paragraphs 201 to 219, inclusive. The ques-

tion is whether they are within the scope of a Wage Order made applicable to the Lumber and Timber Products Industry which became effective November 3, 1941. They manufacture and sell bows and arrows and 35 different articles of archery equipment consisting in part of arm guards, finger tabs, arrow pouches, bow strings, targets, scuffing instruments, fletching tools, etc. Wood is used as a constituent part in only three of the 37 articles manufactured and sold by petitioners (R. 33). Petitioners purchase arrow shafts of wood which are already cut into the desired shapes and lengths by the seller (R. 41). The wood shafts are lacquered, nocks which contain grooves for the bow strings are glued on one end, and points are glued on the other. Colored stripes are painted on the arrows. If need be, they are straightened. Feathers are purchased in large quantities, sorted, trimmed, and glued on the arrows. The gluing of the feathers on the arrow is called fletching. The feathers must be precisely applied if the arrow is to fly on a straight line (R. 11-13).

The arrow shafts cost one cent each. The feather, point, nock and other materials added to the arrow shaft cost three cents. The work of converting arrow shafts into finished arrows is performed almost entirely by women. They are untrained when first employed. They start at a wage of 30 cents per hour which is gradually increased. At the end of a year's service they are paid 35 cents per hour (R. 40).

Most bows are made from wood purchased from some lumber manufacturer which is already cut into pieces approximately six feet long. These pieces of wood are smoothed, placed in soda to remove oils, and are then taken out and sanded down to the right shape. A leather handle riser is glued to the middle (R. 21). The bows are then

sent to the Finishing Department. Here they are dipped into a vat of sand and sealer and racked. While racked they are varnished by use of a spray gun. They are then placed in a bow handle turning machine, and as they rotate glue is applied to the handle and a leather band is wrapped around the handle. The leather on the handle is then covered with cellulose tape. Strings are then placed on the bow. The strings are made of linen cord. Strands are twisted together by small motors and an adhesive material is added. A machine measures the tension of the bow string (R. 13). The spray gun used for painting is operated by boys. The other work done in the finishing of a bow is performed by women (R. 13). Like those who finish arrows, they start at 30 cents per hour and the rate is gradually increased to 35 cents per hour (R. 40). The cost of the wood which is used in making bows is less than the cost of the other materials (R. 57).

Only 7 per cent of the employees of petitioners cut wood with saws or shapers. Only 7 per cent of the employees of petitioners operate sanding machines. Only the bows are shaped, cut or sanded. No reworking of arrows is necessary. The 14 per cent who do wood work of any kind are paid wages ranging from 35 to 85 cents per hour (R. 57). The other 86 per cent of the employees of appellants paint, lacquer, fletch, wrap handles, cut feathers, glue points and nocks, add bow strings, and make 34 articles of archery equipment which are woodless.

Petitioners had never supposed that they were part of the Lumber and Timber Products Industry. They always regarded themselves as "sporting goods manufacturers". That is the way they are classified by insurers

who rate them for compensation insurance (R. 49). There are ten bow and arrow manufacturing plants in the United States (R. 57). That is a substantial and a definable group.

On May 17, 1941, the Administrator of the Wage and Hour Division of the Department of Labor, pursuant to the provisions of 29 U.S.C.A. 208 (a), and by Administrative Order No. 109, formed Industry Committee No. 30 for the Lumber and Timber Products Industry. In the Order forming the committee he defined the Lumber and Timber Products Industry as follows:

> "Wood saw milling and surfacing; wood reworking, including but without limitation kiln or air drying and the manufacture of planing mill products, dimension stock, boxes and wood turnings and shapings; the manufacture of specialized timber products including but without limitation shingles, cooperage stock, veneer, plywood, and veneer packaging; provided, however, that the term does not include cooperage or the manufacture of cigar boxes, cork products, reed and rattan products except vegetable and fruit baskets, or furniture and furniture parts as defined in Administrative Order No. 108" (R. 94-95).

The Committee met, heard testimony, and recommended a minimum wage of 35 cents per hour for all industries within the definition. The definition was never altered in the course of the deliberations of the Industry Committee. The Committee's recommendation was filed with the Administrator. Using the same definition he published notice of the hearing to be held before him in the Federal Register, as required by the provisions of 29 U.S.C.A. 208 (g). At such hearing he decided to approve the recommendation. Wage Order No. 30 was promulgated and made effective as of November 3, 1941 (R. 105). The

Wage Order was again published in the Federal Register, the definition being the same.

More than six months after Wage Order No. 30 became effective the Administrator notified the petitioners that under his interpretation they were within the scope of the Wage Order and demanded that they comply with its provisions (R. 46).

Petitioners declined to comply with the Wage Order because they were not "defined" therein, as required by 29 U. S. C. A. 208 (f). The Administrator sued the petitioners in the District Court asking for a mandatory injunction to compel compliance with the provisions of the Order. The District Court granted the relief prayed. Petitioners appealed to the United States Circuit Court of Appeals Eighth Circuit, and the decree was affirmed (R. 117).

II

Reasons Relied on for the Allowance of the Writ

The United States Circuit Court of Appeals, Eighth Circuit, has decided an important question of Federal law which has not been, but should be, settled by this Court. That question is the meaning of the word "define" as used in 29 U.S.C.A. 208 (f). If that word means that the Administrator shall describe industries to be included within a Wage Order with such certainty as will enable a citizen of ordinary intelligence to know that the particular industry with which he is connected is included, then the judgment of the United States Circuit Court of Appeals should be reversed. That Court, in effect, holds that the definition need not be subjected to such a test.

Wherefore, your petitioners pray that a Writ of Certiorari issued under the seal of this Court be directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said court to certify and send to this Court a full and complete transcript of the records and proceedings of the said court had in the case numbered and entitled on its docket No. 12584, Civil, Ben Pearson, Carl B. Haun and J. T. Haun, doing business as Ben Pearson Company, appellants, v. L. Metcalf Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 28th day of December, 1943.

BEN PEARSON, CARL B. HAUN AND J. T. HAUN,
doing business as BEN PEARSON COMPANY

By J. W. DICKEY
HENDRIX ROWELL
A. F. HOUSE

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